98

No. 07- 1097

FILED
JUN 30 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

Kenneth Allen Goldblatt,

Petitioner,

-v-

Carey D. Ebert, Trustee,

Respondent

On Petition for Writ of Certiorari
to the United States
Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

Frank P. Hernandez
716 Wayne Avenue
Dallas, TX 75223
(214) 821-1213
Counsel of Record

Question Presented.

Was the "late filing" of the petitioner's Brief which caused the court of appeals to dismiss the petitioner's appeal caused by court personnel rather than by the petitioner and is it a denial of due process to punish a blameless litigant for the mistakes or oversights of court personnel?

TABLE OF CONTENTS

Question Presented For Review i
Table of Contents ii
Table of Authorities iii
Corrected Statement of the Case 1
Reply to Respondent's Argument in Opposition ... 7
Restatement of Petitioner's Argument 7
Respondent's Claim of No Violation 7
Respondent's Claim That Petitioner is Wrong 7
Respondent's Claim That Petitioner Rights Were Not Violated 8
Respondent's Due Process Analysis 8
Respondent's Claims of Petitioner's Failures Are False 9
Conclusion 10

APPENDIX

Exhibit A. File Stamps Illustration June 23, 2004 11
Exhibit B. Excerpt: Motion to Supplement the Record August 8, 2004 12
Exhibit C. Final Judgment of District Court February 25, 2005 13
Exhibit D. Court of Appeals Decision August 18, 2006 14
Exhibit E. Affidavit of Counsel April 3, 2007 15
Exhibit F. District Clerk's Letter to Counsel September 12, 2006 17
Exhibit G. Counsel's Letter to Administrative Judge September 26, 2006 18

TABLE OF AUTHORITIES

In re Tampa Chain Co., Inc.
835 F.2d 54, 55 (2nd Cir. 1987)
(per curiam).340 U.S. 193 (1950)..... 3-4

Bowles v. Russell
127 S.Ct. 2360, 2364-65 (2007)..... 10

Kontrick v. Ryan
540 U.S. 443, 453 (2004)..... 10

Rule 8001(a)..... 3

"CORRECTED" STATEMENT OF THE CASE

Respondent's Brief in Opposition simply underlines Petitioner's on-going contention that as Trustee, Respondent has never had a grasp of the facts or true issues of this case, and continues to ignore both as relate to her duties to the estate, its creditors, and the debtor himself.

To say that "Carey Ebert just doesn't get it" is perhaps the most succinct summary possible.

Respondent's allegation of "revisionist history" is patently false because her "facts" are either wrong or misinterpreted.

1. Respondent disregards the fact that the underlying state court case was a dispute over the value of a piece of commercial real estate that had been mortgaged in 1985 for $283,547.97, for which the judgment creditor had agreed to pay $327,000 in 1991, and purportedly paid $320,800.00 in 2004. She ignores the 1994 state trial court by summary judgment that Petitioner's foreclosure cut off the tenant's rights to purchase the Property and refuses to admit to the Court that she abandoned the Property to the judgment creditor without ever demanding rent or offsets for the value represented. These are the simple, governing facts of fifteen years' litigation.

2. Although Petitioner's 1994 foreclosure cut off all of the tenant's rights to purchase the Property, the 2000 Judgment inexplicably gave the tenant a permanent injunction preventing Petitioner from taking possession of or interfer-

ing with the tenant's use of the Property in any way. No court – nor the Respondent – has ever addressed this obvious deprivation of Petitioner's property rights by the courts, or explained how Petitioner owned the Property but was prohibited by a court from using and enjoying it.

3. Respondent's summary of Petitioner's change of status in bankruptcy is misleading. The judgment creditor initiated the action to change Petitioner's bankruptcy status, claiming the estate could not satisfy its judgment by grossly overstating the judgment's value while grossly understating the Property's value. The misrepresentation of these two material facts misled the bankruptcy court and caused the resulting cascading errors.

4. Trustee's appointment is not disputed.

5. Petitioner vigorously disputes Respondent's assessment of the Property's value. Respondent's abandonment had been set up by the questionable change of status engineered by the judgment creditor to which she simply acquiesced.

6. The motion to abandon was approved based on judgment creditor's agents' testimony and the Trustee's blind acceptance of that testimony.

7. Respondent's claims that only then did Petitioner assert his claims for rent are false. Petitioner had been asserting those claims for years.

8. Respondent falsely claims that the back rents issue was "previously litigated". It was not.

9. Petitioner agrees his suit was denied.

10. Petitioner agrees he moved for a rehearing.

11. Petitioner agrees he appealed to the District Court on August 12, 2003.

12. Neither Petitioner nor his counsel received notice of any deficiency until just before the appeal was docketed and immediately corrected that deficiency.

13. Neither Petitioner nor his counsel received notice as to when his brief would be due either at the time that deficiency was corrected or thereafter.

14. It is untrue that Petitioner filed no brief, and equally untrue his counsel claimed that he was "too busy." Petitioner's filing listed three reasons for the counsel's delay: producing a writ to this Court, unfamiliarity with the bankruptcy filing deadlines, and not informed by his staff of the notice.

15. Rule 8001(a) states that "[a]n appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court . . . deems appropriate, which may include dismissal of the appeal." The language of the rule makes clear only the failure to file a notice of appeal deprives the reviewing court of jurisdiction and mandates dismissal. *In re Tampa*

Chain Co., Inc., 835 F.2d 54, 55 (2nd Cir. 1987) *(per curiam)*. June 23, 2004, Petitioner's timely response to the Order to Show Cause of June 9, 2004 included a copy of his finished Appellant's Brief, a separately filed Appeal Brief, and his Motion to Supplement. The actions of the filing clerk are recounted in detail in Petitioner's Writ. (p. 7).

16. Petitioner presented his evidence separate filing the Brief through the file stamps on the document to the judge. who rejected his proof without a hearing. A copy of the time-stamp illustration is attached as Exhibit A.

17. Respondent, unfamiliar as she is with the facts, misstates them: Only Petitioner's Motion to Supplement was unfiled, then inexplicably accepted and re-filed. An excerpt of the Motion showing those file-stamps is attached as Exhibit B. When the court notified Petitioner that the Brief needed to be filed "separately as its own document," Petitioner did so immediately. (Petitioner's Writ, pp. 7-8.)

18. Respondent's rush to mislead this Court shows the bankruptcy of her argument. The record shows the appeal "DISMISSED WITHOUT PREJUDICE to its refiling" (capitals in original). The Judgment of February 25, 2005 attached as Exhibit C.

19. Further, Respondent's unfamiliarity with the choreography of case at this point is understandable enough since she was represented throughout this period by the judgment

creditor's counsel, who signed all of the pleadings without ever entering a formal appearance on her behalf or notifying the Trustee of the Northern District of any potential conflict of interest in his doing so. That appearance of impropriety aside, the Fifth Circuit Panel's statement was error, relating not to Petitioner's Response or Brief, but to his Motion to Supplement. However, when this error was pointed out to the Fifth Circuit panel, they ignored it and denied Petitioner any relief. An image of the first page of the Motion to Supplement referred to in the Fifth Circuit Opinion of August 18, 2006 is attached as Exhibit D. Respondent's aspersions come from confusing the panel's error.

20. Petitioner's hearing was denied on October 2, 2006, not 2005 as Respondent claims.

21. Respondent's attempt to separate the case is specious. Petitioner's re-filing was completely proper and lawful, based on the District Court's original dismissal "without prejudice" and the Fifth Circuit's affirmation of it.

22. Petitioner's reasons for foregoing certiorari were based upon advice of counsel. The decision to restart the unprejudiced appeal was to avoid any potential limitations problems. Thus, Respondent's claim of prior adjudication is false.

23. Petitioner agrees that the bankruptcy court turned down the new suit on October 6, 2006.

24. Notice of Appeal was filed on October 20, 2006.

25. Petitioner objects to Respondent's "Second Appeal" characterization.

26. Respondent's characterization of the District Court's dismissal of the appeal is factually flawed and misleading. The January 2007 dismissal was based on the circumstances of the 2004 filing. The district court dismissed the appeal before the bankruptcy clerk transmitted the record on appeal or a time for filing the Brief was set. The fact that the Brief had been written and timely filed years before makes this assertion ludicrous.

27. The Fifth Circuit affirmed the erroneous ruling.

28. Respondent's sarcastic allusion to "some unknown clerk" is especially troubling. Petitioner's counsel investigated the Brief's filing and unfiling and found that the District Clerk admitted during a telephone conversation that "the unfiling of the Brief as a separate document resulted from 'a mistake' by the intake clerk and, since the time of that 'mistake', the procedures within the office had been changed to prevent a recurrence of such an event." Petitioner's Counsel's Affidavit executed on April 7, 2007 is attached as Exhibit E. The District Clerk, however, failed and refused to admit the mistake in writing self-servingly claiming ". . . I have no personal knowledge concerning this matter . . . ." A copy of her letter is attached as Exhibit F. As a result, Petitioner's counsel wrote to the Chief Administrative Judge of the Northern District of Texas on September 26, 2006 to make him aware of the matter. A copy of his letter is attached as Exhibit G. Still, no action was taken by anyone in authority

in the Northern District to correct the violations of Petitioner's rights in the cascade of uncorrected errors.

REPLY TO RESPONDENT'S ARGUMENTS

Restatement of Petitioner's Argument

Respondent correctly stated Petitioner's argument.

Respondent's Claim of No Violation

Petitioner's appeal was thwarted on procedural grounds throughout its tortured journey through the Fifth Circuit courts. The errors Respondent refuses to recognize or even acknowledge exalt form over substance – which has never been sanctioned by our courts. It is ludicrous to expect litigants to personally monitor the internal workings of a clerk's office to insure its personnel's conscientious attention to their duties. Using all of the caution the circumstances permitted, Petitioner filed his Brief in the district court no less than three (3) times.

Respondent's Claim Petitioner is Wrong Demonstrates Respondent's Ignorance of the Facts

Petitioner has made various showings of proof to virtually every court and individual involved in the adjudication of this case only to have them ignore, misunderstand or simply deny (as Respondent does) the proof presented. Petitioner respond-

ed energetically to the district court's June Order to Show Cause by filing a specific answer to the Order, which an analysis of the record shows was accepted by the district court as adequate since that court did not act immediately to dismiss the appeal and, when it did dismiss, did so without prejudice.

Respondent's Meritless Claim That Petitioner's Rights Were Not Violated

Respondent's claim that any argument was made and lost is pure fiction. Each and every ruling in the chain in the entire length of this litigation has been based on one erroneous procedural ruling or assumption after another flowing from the Clerk's mistake.

Respondent's Due Process Analysis Substantiates Petitioner's Claim

Courts have clearly deprived Petitioner of a valuable piece of commercial real estate, its improvements, and the fruits of its rents for almost fifteen (15) years through procedures that under virtually any legal analysis can only be characterized as "conflicting", "confused", "unlawful" and "erroneous."

The cascading series of errors based on the bogus value propounded from the state court through the bankruptcy court and the subsequent appeal courts has now been exposed by a Constable's Sale price of more than three times the value claimed, and turns the bankruptcy's propositions upside down.

Respondent's Claims of Petitioner's Failures Are False

Any thoroughgoing analysis of Petitioner's many pleadings to the courts below shows that Petitioner made valid claims that were simply misunderstood or brushed. This Court in *Bowles*, in considering the effect of a violation of procedural rules which were adopted by a court rather than by statute, stated: "On the other hand, we have treated the rule-based time limit for criminal cases differently, stating that it may be waived because '[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion. . ." *Bowles v. Russell*, 127 S.Ct. 2360, 2364-65 (2007). See also *Kontrick v. Ryan*, 540 U.S. 443, 453 (2004) (Bankruptcy Rules adopted by the court for the orderly transaction of its business are not jurisdictional).

Petitioner's brief was in fact timely filed as a separate pleading on June 23, 2004 only to be "unfiled" by the mistaken actions of a clerk over whom he had no control and could exercise no authority. Even when his counsel contacted the District Clerk and the Chief Administrative Judge, no action to correct the error – or even acknowledge it – was ever taken. Instead, the various actors have tried to torpedo the case with bogus claims of procedural errors or by simply ignoring the facts once they have been pointed out. The results are nothing less than injustice.

CONCLUSION

Reading Respondent's explanation, one would believe that Petitioner did nothing to seek the justice he deserves. Nothing could be – or is – further from the truth. Any thoroughgoing reading of the mountainous stack of pleadings prepared for the bankruptcy court, the two district courts and the two Fifth Circuit panels make it crystal clear that each time Petitioner met with a negative outcome he availed himself of the next step in the appellate process. Every court file shows notices of appeal, motions for rehearing, motions for new trials, and motions for rehearing en banc. In every case, motions after judgments and orders point out to the courts the errors complained of, and most present documentary evidence or visual proofs.

Petitioner asks plaintively:

"What more could I have done?"

Respectfully submitted,

Frank P. Hernandez

BEST AVAILABLE COPY

EXHIBIT A
File Stamps of Separately Filed Brief

"FILESTAMP/RECEIVED STAMP" EXHIBIT

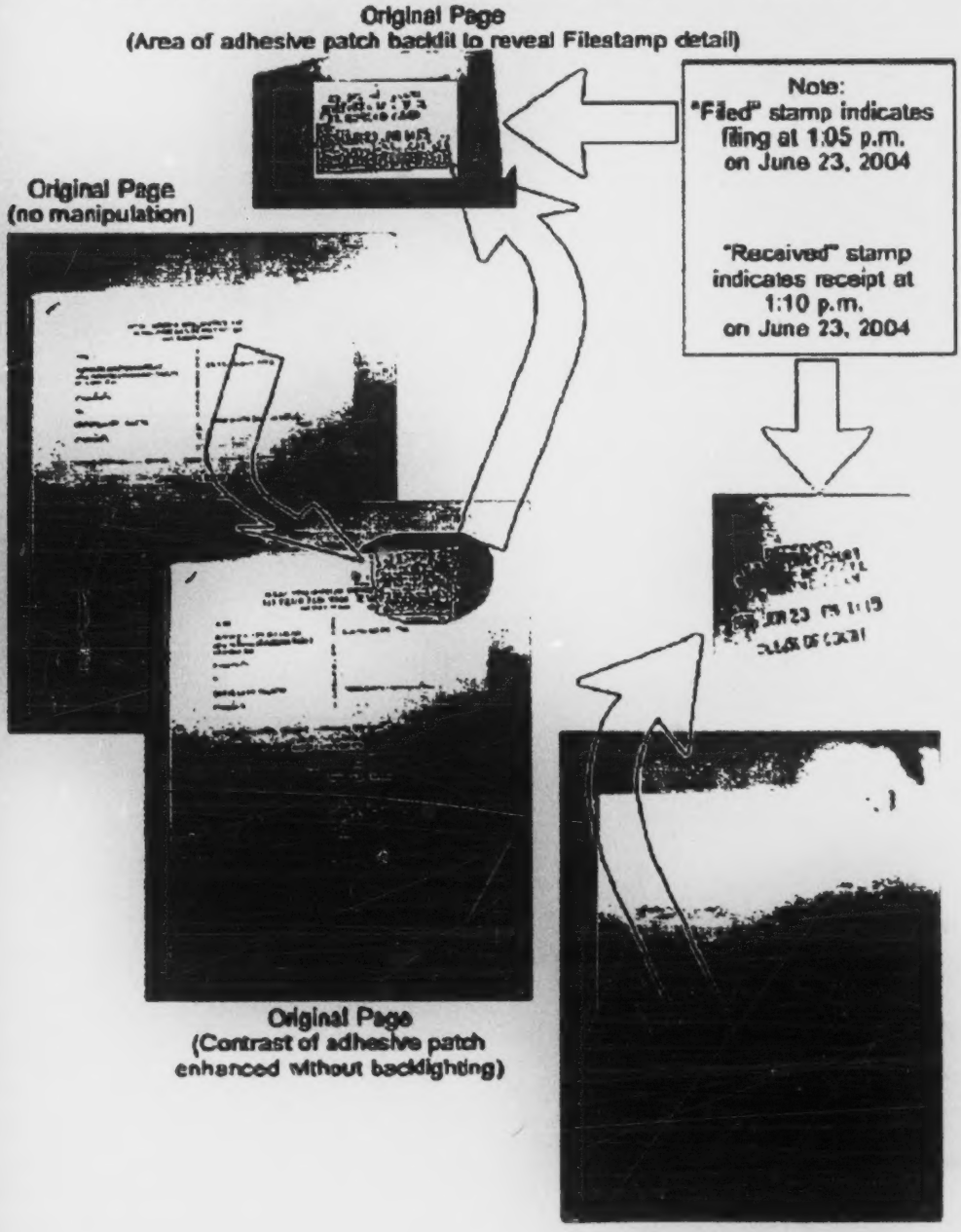
Original Page
(Area of adhesive patch backlit to reveal Filestamp detail)
Note:
"Filed" stamp indicates filing at 1:05 p.m. on June 23, 2004
"Received" stamp indicates receipt at 1:10 p.m. on June 23, 2004
Original Page
(no manipulation)
Original Page
(Contrast of adhesive patch enhanced without backlighting)

EXHIBIT B
Excerpt: Motion to Supplement Record

FILED
U.S. DISTRICT COURT
NORTHERN DIST. OF TX
FT. WORTH DIVISION
2004 AUG -3 PM 1:05

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Fort Worth Division

KENNETH ALLEN GOLDBLATT § Case No 4:04-CV-337-Y
§
vs. §
§ Appeal from the Bankruptcy Court
CAREY EBERT, TRUSTEE §

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL 2 2004
CLERK, U.S. DISTRICT COURT

MOTION TO SUPPLEMENT RECORD

TO THE HONORABLE TERRY R. MEANS,
UNITED STATES DISTRICT JUDGE:

KENNETH ALLEN GOLDBLATT, Appellant Debtor herein, files this his Motion to Supplement Record In support of this Motion, Goldblatt respectfully shows the Court the following:

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG - 3 2004
CLERK, U.S. DISTRICT COURT

Kenneth Allen Goldblatt (hereinafter, "Appellant"), requests this permission to supplement the record with the following documents:

1. Constable's Deed of April 14, 2004, designated as "Record Supplement 2" [RS2] and so designated in Appellant's Brief
2. Petition for Writ of Prohibition, In re A&W Industries, Inc., John C Applewhite, Bart George, and Sherry Rountree, Relators, In the Court of Appeals, Second District of Texas, Fort Worth, Texas, filed September 19, 2000, designated as "Record Supplement 3" [RS3] and so designated in Appellant's Brief.

EXHIBIT C
Final Judgment of District Court

ORIGINAL

FILED
FEB 25
CLERK, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH ALLEN GOLDBLATT	§	
	§	
VS	§	ACTION NO 4:04-CV-337-Y
	§	
CAREY EBERT, Trustee, ET AL.	§	04-43193-dm7

FINAL JUDGMENT

In accordance with the order issued this same day and Federal Rule of Civil Procedure 58,

It is hereby ORDERED, ADJUDGED, and DECREED that the above-referenced bankruptcy appeal is hereby DISMISSED WITHOUT PREJUDICE to its refiling. All costs of Court under 28 U.S.C. § 1920 shall be borne by Appellant.

SIGNED February 25, 2005

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

EXHIBIT D
Fifth Circuit Opinion of August 18, 2006

United States Court of Appeals
Fifth Circuit
FILED
August 18, 2006
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 05-10747
Summary Calendar

In The Matter of: KENNETH ALLEN GOLDBLATT,

Debtor,

KENNETH ALLEN GOLDBLATT,

Appellant,

versus

CAREY EBERT, Trustee,

Appellee.

Appeal from United States District Court
for the Northern District of Texas
No. 4:04-CV-337

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:*

Kenneth A. Goldblatt challenges the determination of the district court that he failed to file his brief on appeal, and the resultant orders that dismissed his bankruptcy appeal, with prejudice, and denied his motion for new trial. We affirm.

*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

EXHIBIT E
Affidavit of Petitioner's Counsel

AFFIDAVIT

STATE OF TEXAS

DALLAS COUNTY

Before me, the undersigned person, on this day personally appeared **FRANK P. HERNANDEZ**, who is personally known to me, and first being duly sworn according to the law upon her oath deposed and said:

"My name is Frank P. Hernandez. I am over the age of 18 years. I have never been convicted of a crime, and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are all true and correct.

1. I am a licensed attorney in the State of Texas, admitted to practice in the Northern District of Texas and other jurisdictions.

2. I have represented Appellant Kenneth Allen Goldblatt since 1994 in the suite of litigation in state and federal fora that includes the previous and instant appeals before this Court.

3. Before filing the present (second) appeal on the matter now before this Court, I contacted the Federal District Clerk's Office, Fort Worth Division, to investigate the circumstances of the filing and unfiling of Appellant's Appeal Brief and the dismissal of the appeal "without prejudice" in the prior appeal of the subject matter before this Court.

4. In this effort, I contacted an assistant District Clerk, who told me that the unfiling of Appellant's Appeal Brief as a separate document resulted from "a mistake" on the part of the intake clerk and, since the time of that "mistake" the procedures within the office have been changed to prevent a recurrence of such an event.

5. In pursuing this matter, I also wrote to the Administrative Judge for the Northern District of Texas who refused to correct the clerk's error.

6. It is my professional opinion, based in part on over forty years of legal practice, that the dismissal of Appellant's first appeal resulted from a mistake by the presiding judge, based on a mistake by the intake clerk and the Clerk's Office, and that the dismissal of the instant appeal resulted from a misunderstanding by the presiding judge in the instant (second) appeal of the same matter.

7. It is my further professional opinion that if the original district judge had meant to end the appeal permanently, he would not have allowed Appellant to supplement the record with the document now before this Court, and would not have dismissed the appeal "without prejudice" to its refilling as the record shows that he did.

FURTHER AFFIANT SAITH NOT

Frank P. Hernandez

State of Texas

County of Dallas

Before me, a notary public in and for Dallas County, Texas, on this day personally appeared Frank P. Hernandez, to me well known to be a credible person of lawful age and qualified in all respects to make this affidavit, who being first sworn on oath, says that he has the capacity to make this affidavit and that every statement is true and correct.

Subscribed and sworn before me on April 3, 2007, to certify which witness my hand and seal of office.

Notary Public
State of Texas

My Commission Expires

2/28/2010

JOANNE CONSTANTINIDES
Notary Public, State of Texas
My Commission Expires
02/26/2010

EXHIBIT F
District Clerk's Letter to Petitioner's Counsel

United States District Court
Northern District of Texas

Karen Mitchell
Clerk of Court

1100 Commerce, Room 1452
Dallas, Texas 75242

September 12,2006

Mr Frank P Hernandez
716 Wayne Street
Dallas, TX 75223

SUBJECT Civil Action No 4:04-CV-337-Y, Goldblatt v Ebert

Dear Mr Hernandez.

I am writing in response to your attached letter dated September 12,2006 In your letter, you ask me to write a letter acknowledging that you filed a brief in the Fort Worth division on June 23, 2004, as a separate document and that it was mistakenly unfiled and stamped "received " I have no personal knowledge concerning this matter and am therefore unable to comply with your request

Sincerely,

Karen Mitchell

Attachment

cc: Pam Murphy

EXHIBIT G
Counsel's Letter to Chief Administrative Judge

FRANK P. HERNANDEZ
LAWYER
716 WAYNE STREET
DALLAS, TEXAS 75223

Telephone
(214) 821-1213
Fax
(214) 821-1015
E-mail
fpenglo@aol.com

September 26, 2006

Judge Joe Fish
Chief Administrative Judge
U. S. District Judge
1100 Commerce
Dallas, TX 75201

Re.: Civil Action No. 4:04-CV-337-Y, Goldblatt v. Ebert

Dear Judge Fish:

I enclose for you a copy of my letter to U. S. District Clerk Ms. Karen Mitchell of September 12,2006. I enclose for you her incredible response of June 12,2006. I enclose for you my client's Petition For Rehearing En Banc that was properly filed with the Fifth Circuit Court of Appeals on September 19, 2006. All of these documents clearly describe the situation as relates to this case.

I consider this matter an administrative matter that has had grave impact on my client's right to a meaningful appeal before Judge Means. I consider his actions to be administrative. And, it need not be said, but the actions of the agents, servants and employees of the U. S. District Court are clearly administrative.

I write you so that you, as the boss of the U. S. District Clerk can know of this situation and can take action to rectify this injustice.

I know that you do not care for me, and it really generally doesn't impact me, nor does the fact that Judge Means has the same feelings. However, actions against me are individual to me, but actions against me that gravely impact my client are not acceptable and are not taken lightly.

Please review this matter in an objectionable manner and you will see that this case needs to be decided on the merits by Judge Means. It is not acceptable to my client or me that it is in the judicial system. It is clearly an

administrative matter where the U. S. District Clerk was completely wrong and the error needs to be corrected. If it is not I fear that much judicial effort will ensue in the form of unnecessary litigation against all who had an opportunity to rectify the wrong done to my client.

If you want to discuss this matter you may call me at 214-826-0488.

Thank you for your attention to this matter.

Sincerely yours,

Frank P. Hernandez

Encls.